STATE OF MICHIGAN
IN THE SUPREME COURT

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION, JOSEPH SPYKE, and **JEANNE DAUNT,**
Plaintiffs – Appellants,

v

SECRETARY OF STATE and **MICHIGAN BOARD OF STATE CANVASSERS,**
Defendants / Cross-Defendants – Appellees,

and

VOTERS NOT POLITICIANS BALLOT COMMITTEE, d/b/a **VOTERS NOT POLITICIANS, COUNT MI VOTE,** a Michigan Non-Profit Corporation, d/b/a **VOTERS NOT POLITICIANS, KATHRYN A. FAHEY, WILLIAM R. BOBIER** and **DAVIA C. DOWNEY,**
Intervening Defendants / Cross-Plaintiffs – Appellees

Supreme Court
No. 157925

Court of Appeals
No. 343517

INTERVENING DEFENDANTS / CROSS-PLAINTIFFS – APPELLEES' BRIEF IN RESPONSE TO BRIEF OF AMICUS CURIAE ATTORNEY GENERAL

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INTERVENING DEFENDANTS / CROSS-PLAINTIFFS – APPELLEES' BRIEF IN RESPONSE TO BRIEF OF AMICUS CURIAE ATTORNEY GENERAL

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COUNTER-STATEMENT OF QUESTION PRESENTED

I. HAS THE BALLOT PROPOSAL AT ISSUE BEEN PROPERLY PRESENTED AS A VOTER-INITIATED PROPOSAL FOR AMENDMENT OF THE CONSTITUTION PURSUANT TO CONST 1963, ART 12, § 2?

The Court of Appeals has answered this question "Yes."

The Plaintiffs – Appellants contend the answer should be "No."

Amicus Curiae Attorney General Schuette contends the answer should be "No."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "Yes."

INTRODUCTION

Attorney General Bill Schuette has donned the mantle of Friend of the Court, emphasizing his status as a constitutional officer and his obligation to protect the Constitution and the rights of the people, but he has written in support of the Plaintiffs' suggestion that the constitutionally guaranteed right of the people to vote on the proposed constitutional amendment at issue should be denied.

Attorney General Schuette's argument that the voter-initiated amendment proposed by Appellee Voters Not Politicians ("VNP") must be considered a "revision" which can only be proposed by a constitutional convention is not supported by any language of the Constitution itself, and finds no genuine support in the precedents of this Court. His argument relies, instead, upon an artificial distinction between "amendment" and "revision" adopted by our Court of Appeals in *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273; 761 NW2d 210 (2008), *result affirmed,* 482 Mich 960; 755 NW2d 157 (2008) – a distinction which was based primarily upon case law from other states construing the language of ***their*** constitutional provisions, and injected into our own constitutional jurisprudence by judicial fiat. The Court of Appeals in this case appropriately concluded that even if this test is applied, it does not justify denying the voters their opportunity to consider VNP's proposal.

Adhering to the standard applied in *Citizens Protecting Michigan's Constitution* – a standard which this Court declined to adopt when affirming only the result – Attorney General Schuette has joined the Plaintiffs in suggesting that VNP's proposal cannot be presented to the people for their approval or disapproval because it proposes a "fundamental" change that "would alter the basic structure of Michigan's government." This suggestion is evidently based upon an assumption that the people of Michigan are incapable of considering and deciding

matters of importance, and that such matters must therefore be addressed and decided for them by constitutional convention delegates who have been elected in a "partisan election" held pursuant to Const 1963, art 12, § 3, after a preliminary vote expressing the people's desire to convene a convention for a "general revision" of the Constitution.

In support of Plaintiffs' argument that VNP's proposal must be considered a "revision," the Attorney General has ventured beyond the arguments offered by the Plaintiffs in this matter, asserting that establishment of the proposed Independent Citizens Redistricting Commission would violate the constitutional separation of powers. And in support of that new argument he has gone so far as to make the wholly unfounded suggestion that the new Commission could be characterized as a "fourth branch of government."

As discussed in greater detail *infra*, a careful comparison of the substance of VNP's proposal with the content of the existing constitutional language found in Const 1963, art 4, §§ 1-6 leads to the inevitable conclusion that VNP's proposal ***does*** address a single overall purpose – to remedy the abuses associated with partisan gerrymandering of state legislative and congressional districts – and that all of the proposed changes are germane to the accomplishment of that purpose. That examination will also reveal that the proposed and existing provisions are similar in many respects, and that the similarities are far more significant than the differences. When this is seen, it will become clear that the Attorney General's suggestion that VNP's proposal would upset the constitutional separation of power by effecting a "fundamental" change altering "the basic structure of Michigan's Government" is greatly exaggerated, and ultimately, devoid of merit.

The framers of our current Constitution proposed that the periodic redistricting of state legislative districts be performed by a Commission on Legislative Apportionment. In 1963, the

people of Michigan voted to approve our present Constitution, which included the provisions establishing the Commission on Legislative Apportionment for that purpose and governing its organization and the performance of its duties in Const 1963, art 4, §§ 2-6, where those provisions are found today.[1]

The constitutionally prescribed Commission on Legislative Apportionment was, in its most fundamental aspects, quite similar to the new Independent Citizens Redistricting Commission which would be created by VNP's proposal if approved by the voters, and thus, it may be seen that VNP has not proposed a completely new or revolutionary idea. The Court of Appeals aptly noted this similarity in its Opinion:

> ***"Moreover, the VNP Proposal is not wholly new. It does not create an entirely new commission regarding redistricting; the commission already exists in our Constitution,*** although admittedly it has not been active for decades given Reynolds. The VNP Proposal merely changes the method by which the commissioners will be chosen going forward and adds additional members who are avowed independent voters. It does not wholly impede legislative power, where legislative leaders retain the power to veto proposed commission members. Undeniably, it introduces new concepts, but it does so in a finite manner. The body of Michigan case law does not hold that the addition of new concepts within the framework of our existing constitution precludes an initiative petition." Slip Op. at p. 19. (Emphasis added)

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[1] The constitutionally prescribed Commission on Legislative Apportionment has not been utilized for apportionment of Michigan's legislative districts since 1972, as this Court's decision in *In re Apportionment of State Legislature*, 413 Mich 96; 321 NW2d 565 (1982) held that the constitutionally prescribed use of weighted land area/population formulae violated the Equal Protection Clause of the U.S. Constitution, and that the invalid provisions were not severable because it could not be safely assumed that the people would have voted to approve the Constitution without them. More recently, the Legislature has had the responsibility for performing the periodic reapportionment of election districts for the Michigan Senate and House of Representatives, subject to review and independent action by the Supreme Court, pursuant to 1996 PA 436, MCL 4.261 *et seq.*, as amended. The reapportionment of Michigan's congressional election districts has been performed in similar fashion pursuant to the provisions of 1999 PA 221, MCL 3.61, *et seq.* and 1992 PA 222, MCL 3.71, *et seq.*.

The Attorney General's contention that VNP's proposal would effect a fundamental change that would dramatically alter the structure and functioning of our state government is without merit. VNP's Proposal would simply re-establish an important component that the voters understood and expected when they approved our current Constitution in 1963 – that the apportionment of legislative districts would be performed by an independent commission. As the Court of Appeals concluded in this case:

> "Where our existing Constitution has provided for a commission to draw the districting lines, it follows that an independent commission to do the same would not be so violative of the Constitution so as to preclude this proposal from placement on the ballot." Slip Op. at p. 19.

VNP is mindful that parties to litigation before this Court rarely file a response to an *amicus curiae* brief. VNP has filed this responsive brief because Attorney General Schuette has raised new and different arguments in support of the Plaintiffs' position – arguments which have been clothed with the prestige of his office, but do not withstand scrutiny. Plaintiffs have asked this Court to deny the people of Michigan their constitutionally reserved right to vote on VNP's proposed constitutional amendment, and they have made that request in spite of this Court's precedents which have long emphasized that the free exercise of that right should be facilitated, rather than burdened or curtailed. By joining in that request, the Attorney General is asking this Court to disregard one of the most fundamental principles of constitutional law – that all power emanates from the people. Const 1963, art 1, § 1. And under a system of government based on grants of power from the people, "constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed." *Woodland v Michigan Citizens Lobby,* 423 Mich 188, 243; 378 NW2d 337 (1985), quoting *Kuhn v Dept of Treasury,* 384 Mich 378, 385; 183 NW2d 796 (1971).

The Attorney General's presentation of groundless arguments in support of Plaintiffs' request is seen as a cause for grave concern, and this has suggested an unusual need to respond. This brief is therefore respectfully submitted by VNP and the other Intervening Defendants – Appellees in response to the Attorney General's *amicus curiae* brief to ensure that the issues will be kept in proper perspective, and the interests of justice properly served in this matter.

COUNTER-STATEMENT OF FACTS

The Intervening Defendants – Appellees shall continue to rely upon the excellent summary of the pertinent facts provided in the Court of Appeals' Opinion, and the discussion of the facts included in their previously-filed brief in opposition to Plaintiffs' Application for leave to Appeal. Additional discussion of the pertinent facts will be included in the body of the Legal Arguments, *infra*, to the extent that such discussion may be required to fully inform the Court.

LEGAL ARGUMENTS

I. THE BALLOT PROPOSAL AT ISSUE HAS BEEN PROPERLY PRESENTED AS A VOTER-INITIATED PROPOSAL FOR AMENDMENT OF THE CONSTITUTION PURSUANT TO CONST 1963, ART 12, § 2, AND THUS, CONSIDERATION OF VNP'S PROPOSAL NEED NOT BE RESERVED UNTIL THE NEXT CONSTITUTIONAL CONVENTION.

A. CONST 1963, ART 12, § 3 DOES NOT LIMIT THE PERMISSIBLE SUBJECT MATTER OR SCOPE OF A CONSTITUTIONAL AMENDMENT PROPOSED UNDER CONST 1963, ART 12, § 2.

As VNP has noted in its recently-filed brief in opposition to Plaintiffs' Application for Leave to Appeal, the provisions of Const 1963, art 12, §§ 2 and 3 provide separate alternative procedures for amendment of our Constitution, and neither provision contains any language

suggesting an intent to limit the permissible scope or operation of the other.[2] Nonetheless, the Plaintiffs and the Attorney General have insisted that there is a legally significant difference between a "revision" and an "amendment" which operates to limit the permissible scope of an amendment proposed by voter-initiative pursuant to Const 1963, art 12, § 2. They have relied primarily upon the qualitative/quantitative test adopted and utilized in *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273; 761 NW2d 210 (2008), *result affirmed,* 482 Mich 960; 755 NW2d 157 (2008) – a standard which was based primarily upon case law from other states, construing the language of their own constitutional provisions, but was also based, to a lesser degree, upon brief discussions of similar issues in *Kelly v Laing,* 259 Mich 212; 242 NW2d 891 (1932) and *School District of the City of Pontiac v City of Pontiac,* 262 Mich 338; 247 NW 474 (1933). The Court of Appeals adhered to its prior decision in *Citizens Protecting Michigan's Constitution,* applying the standard adopted and utilized in that case because it was required to do so by MCR 7.215(J)(1), but ultimately concluded, correctly, that VNP's proposal cannot be considered a "revision" when judged by that standard. This Court is free to disavow the qualitative/quantitative test of *Citizens Protecting Michigan's Constitution,* and VNP again respectfully suggests that it should do so for the reasons previously discussed.

It should be noted, in this regard, that the Michigan authorities cited in *Citizens Protecting Michigan's Constitution* do not provide strong support for its conclusions. In *Kelly v Laing, supra,* this Court found that a multifarious collection of proposed amendments to the Bay City Charter proposing substantial changes in several related and unrelated aspects of the City government was not in a proper form for submission to the voters where the petition at

[2] Copies of Const 1963, art 12, §§ 2 and 3 are attached as Appendices "A" and "B."

issue proposed a separate vote on each of the 13 sections involved, contrary to the governing provisions of the Home Rule Act, but then went on to consider whether changes of the kind proposed could be made by means of a proposed amendment of the Charter, or only by means of a revision.[3] On that point, the Court concluded that the proposed changes were such as could only be accomplished by a general revision of the Charter under the terms of the governing statute, which "rather clearly" contemplated revision by a charter commission with subsequent voter approval as the appropriate method of changing the form of government, because the proposed multifarious changes were extensive, and would have effected a wholesale change in the manner of operation of the City Government.[4] 259 Mich at 216-217, 221-224. In so ruling, the Court expressed its understanding of the difference between an amendment and a revision, explaining that, in general, revision contemplates "a re-examination of the whole law and a redraft without obligation to maintain the form, scheme or structure of the old" while an amendment "implies continuation of the general plan and purport of the law, with corrections

[3] Having concluded that the proposed amendment could not be presented to the voters in the form proposed, the Court's further discussion of whether the proposed changes amounted to a revision was unnecessary to its holding, and was therefore *obiter dicta.*

[4] Like the RMGM proposal considered in *Citizens Protecting Michigan's Constitution,* the proposed amendments at issue in *Kelly v Laing,* addressed several unrelated issues. Those issues included: increasing the number of City Commissioners and changing their election districts; expanding the authority of the Mayor to include a veto power; abolishing the office of City Manager and vesting his powers and duties in the City Commission, with authority granted to that body to delegate those duties by ordinance to other city officers; prohibiting city officers and employees from being interested in city contracts; requiring public bids for certain expenditures; prohibiting diversion of water and light revenues; and providing for water and light service at cost. 259 Mich at 214. In determining that these changes could only be made by means of a revision, the Court found it significant that the proposed elimination of the City Manager and reassignment of his authority and duties would affect 52 of the Charter's 203 sections, and thus opined that, "the extent of the changes as well as their character, necessary to provide transfer of the powers of the city manager to other officers, undoubtedly would require a revision." 259 Mich at 222-223.

to better accomplish its purpose" and that, "[b]asically, revision suggests fundamental change, while amendment is a correction of detail." *Id.*, at 217.

This Court's conclusion, in *Kelly v Laing, supra,* that the separate procedure for revision was required for adoption of the proposed changes is not particularly helpful because that case did not involve interpretation of the constitutional procedures for amendment of the Constitution, but was instead focused upon the distinction that made a difference ***under the controlling terms of the statutory procedure at issue*** in that matter. This is not to say that the generalities expressed by way of the Court's dictum in *Kelly v Laing,* have no merit. The described distinctions said to define the general difference between an amendment and a revision may be found valid with respect to some proposals, like the multifarious proposals involved in *Kelly* and *Citizens Protecting Michigan's Constitution,* which propose multiple unrelated changes that would truly effect a major reconfiguration of government. And, of course, the difference defined by the Court's dictum in *Kelly v Laing,* would also be validly applied to describe a new Constitution or a major rewrite of the existing Constitution, which should only be proposed for adoption at a constitutional convention convened pursuant to the people's vote to authorize a "general revision" of the Constitution under Const 1963, art 12, § 3.

But that is not what has been presented here, as our Court of Appeals has appropriately concluded in this case, stating:

> "Eight decades ago, in 1932, our Supreme Court discussed the fundamental distinctions between revision and amendment in *Kelly v Laing*, 259 Mich 212; 242 NW 891 (1932). The Court held that an initiative petition may encompass one proposed amendment, but may involve more than one section, provided "all sections are germane to the purpose of the amendment."
>
> * * *
>
> Our Supreme Court added:

> "An amendment is usually proposed by persons interested in a specific change and little concerned with its effect upon other provisions of the charter" Slip Op. at pp. 15-16

The true significance of this Court's decision in *Kelly v Laing* is not the *dicta* cited in the Attorney General's brief. It is the idea that it is appropriate to change the Constitution by means of an amendment so long as it has a single purpose. The fact that an amendment may need to revise several sections of the Constitution to effect changes germane to that purpose is irrelevant.

To hold, as the Plaintiffs and the Attorney General have suggested, that an amendment crafted to address a single overall purpose may be considered a "general revision" that can only be proposed at a constitutional convention, would be "fundamentally" inconsistent with this Court's prior decisions holding that a constitutional amendment may alter multiple sections if the changes address a single overall purpose and the changes are germane to the accomplishment of that purpose. *Graham v Miller,* 348 Mich 684, 692-693; 84 NW2d 46 (1957); *Kelly v Laing, supra,* 259 Mich at 215-216; *People v Stimer,* 248 Mich 272, 287; 226 NW 899 (1929). Their argument, based upon the dictum in *Kelly v Laing,* that an amendment can be nothing more than a mere "correction of detail" is also fundamentally inconsistent with the definition of "amendment" provided in those decisions. It is inconsistent with our history as well, because there ***have*** been a number of voter-initiated amendments over the years which have effected sweeping changes that could hardly be characterized as a "mere correction of detail." These would include the Headlee Amendment, the amendment adopted in 1992 to establish the existing constitutional term limits for legislators and the Governor, and the "Proposal A" property tax amendment adopted in 1994, to name a few.

The Attorney General's reliance upon *School District of the City of Pontiac v City of Pontiac,* 262 Mich 338; 247 NW 474 (1933), is also misplaced. In that case, this Court rejected a post-election challenge to the validity of a voter-initiated constitutional amendment based upon a claim that the state election officials had failed to publish all of the existing constitutional provisions that would be altered or abrogated by the proposed amendment. The Court then went on to summarily reject an additional argument that the constitutional amendment, limiting the authority of local governments to assess property taxes, was invalid because its impact was so far reaching as to constitute a revision which should have been accomplished in the manner provided for revisions of the Constitution in Const 1908, art 17, § 4. 262 Mich at 345.

The Court of Appeals Opinion in this matter correctly construed the appropriate significance of this case, stating:

> "One year after *Laing*, our Supreme Court had occasion to consider whether a proposal was a revision or an amendment in *Sch Dist of City of Pontiac v City of Pontiac*, 262 Mich 338, 344; 247 NW 474 (1933). The plaintiff argued that the proposal to limit property taxes that had been approved in the general election was so far-reaching as to invalidate the Constitution and thus was a general revision. The Court disagreed, concluding that it was an amendment because the proposal did not "interfere with" nor "modify" the operation of governmental agencies in such a way to render it a general revision. *Id.* at 345." Slip Op. at p. 16.

Similarly, in this case VNP's Proposal is narrow in scope and does not change or interfere with the operation of other state agencies. It is narrowly tailored to achieve one result – to place the task of redistricting back into the hands of an independent commission that operates free of interference by the Legislature or the Governor.

The Court's Opinion in *Citizens Protecting Michigan's Constitution* also suggests that the rationale for its adoption of the qualitative/quantitative standard was flawed by a failure to recognize that, as used in Const 1963, art 12, § 2, the term "amendment" does not contemplate

a "process of amending," as the Court appears to have assumed. 280 Mich App at 295. By equating an "amendment" proposed or adopted pursuant to Const 1963, art 12, § 2 with a ***process*** similar to the process of revision initiated under Const 1963, art 12, § 3, the Court improperly injected the concept of "revision" into its interpretation of Const 1963, art 12, § 2, where it has no proper application.

The distinction between "revision" and "amendment" of the Constitution made in *Citizens Protecting Michigan's Constitution* is also unsatisfactory, and should therefore be reconsidered or limited to the peculiar facts of that matter, for two additional reasons. First, the nebulous comparison of the qualitative and quantitative nature of changes proposed by that decision provides no clear standards capable of delivering consistent results. Applying that standard in any but the most extreme cases – like the RMGN proposal considered in that case – can be expected to yield widely differing conclusions, and this level of uncertainty cannot be tolerated when suspension of the people's right to propose constitutional amendments by voter initiative is proposed.

Second, and perhaps most importantly, classification of VNP's proposed constitutional amendment as an "amendment" or a "revision" by application of the qualitative/quantitative standard utilized by the Court of Appeals alone in *Citizens Protecting Michigan's Constitution* would be inappropriate because it requires a reading in of limitations that are not found in, and cannot be reasonably implied from, the constitutional language. As previously discussed, it is inappropriate, under established Michigan law, for the Court to read in limitations of the constitutionally reserved right of initiative that the drafters and thus, the people, could have included, but did not. This being the case, decisions from other states interpreting the provisions of ***their*** constitutions are also unhelpful. As Justice Weaver aptly noted in her separate

concurring Opinion in *Citizens Protecting Michigan's Constitution*, the incorporation of extraneous words, phrases and concepts into our Constitution by interpretation is a form of "judicial activism" which improperly threatens a "judicial veto" of voter-initiated proposals for amendment of the Constitution. 482 Mich at 962. Although this may pass constitutional muster under the law of other states, it is not acceptable under the established precedents of this state. As previously discussed, the decisions of ***our*** courts have uniformly held that the free exercise of the people's reserved right to propose amendment of the Constitution by voter initiative cannot be curtailed or unduly burdened by legislative, executive or judicial action.

B. THE PROPOSED AMENDMENT IS LARGELY CONSISTENT WITH THE EXISTING CONSTITUTIONAL LANGUAGE, WOULD NOT EFFECT ANY "FUNDAMENTAL" CHANGE ALTERING THE BASIC FORM OR FUNCTIONING OF STATE GOVERNMENT, AND WOULD NOT VIOLATE THE CONSTITUTIONAL SEPARATION OF POWER.

The Plaintiffs have complained that VNP's proposal must be considered a "revision" because it would effect a "fundamental" change, dramatically altering the basic form and functioning of our state government. The Attorney General has added his voice to that chorus, but has gone a step farther to suggest that the proposed changes would violate the constitutional separation of powers, and in presenting that new argument, he has gone so far as to suggest that the proposed Independent Citizens Redistricting Commission "would be in effect a fourth branch of government, executing legislative, executive and judicial powers." This new argument is fatally flawed because it overlooks the very substantial similarities between VNP's proposal and the existing constitutional language, and is built upon wildly exaggerated claims that the new Commission would somehow exercise authority belonging to the executive and judicial branches of government.

It is useful to note, at the outset, that the distribution of power among the three branches of government is not absolute or inflexible. The Attorney General has correctly noted that, "[t]he powers of government are divided into three branches: legislative, executive and judicial." Const 1963, art 3, § 2. But the Constitution specifically allows for exceptions made by its controlling provisions. Const 1963, art 3, § 2 goes on to say that, "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

Consistent with these directives, this Court has recognized that the constitutional separation of powers is not so strict as to preclude all overlap of responsibilities and powers, and has not been construed to mean that the branches must be kept wholly separate. As the Court explained in *Taxpayers of Michigan Against Casinos v State of Michigan,* 478 Mich 99; 732 NW2d 487 (2007):

> "This Court has established that the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers." *Judicial Attorneys Ass'n v Michigan,* 459 Mich 291, 296; 586 NW2d 894 (1998). An overlap or sharing of power may be permissible if "the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other ...." *Id.* at 297. The Separation of Powers Clause "has not been interpreted to mean that the branches must be kept wholly separate." *Soap & Detergent Ass'n v Natural Resources Comm,* 415 Mich 728, 752; 330 NW2d 346 (1982)." 478 Mich at 105-106.

This Court has also recognized that there is no "fourth branch" of state government, and thus, efforts to characterize autonomous state agencies as such have been rejected. *Straus v Governor,* 459 Mich 526, 536-537; 592 NW2d 53 (1999); *Civil Service Commission v Auditor General,* 302 Mich 673, 682-684; 5 NW2d 536 (1942). By the governing provisions of our Constitution, the people have reserved for themselves the right to amend the Constitution, to initiate legislation, and to approve or disapprove legislative enactments, and in doing so, they

have created for themselves a role that is "closely akin to that of a fourth branch of government." *Woodland v Michigan Citizens Lobby,* 423 Mich 188, 244; 378 NW2d 337 (1985) (Williams, J., Dissenting). Thus, if there is any involvement of a "fourth branch of government" in relation to VNP's proposal, it is the involvement of the people in proposing the amendment at issue.

Const 1963, art 1, § 1 expresses the most important governing principle of all – that, "[a]ll political power is inherent in the people. Government is instituted for their equal benefit, security and protection." In light of this, and the other constitutional provisions and decisions previously discussed, it is clear that the people of Michigan are free to structure their government as they see fit, subject to any restrictions imposed by the United States Constitution, none of which are at issue here.

With these guiding principles in mind, it is now useful to consider the specifics of VNP's proposed amendment and its similarity to the existing provisions of Const 1963, art 4, § 6.[5] As previously discussed, the existing provision approved by the vote of the people in 1963 assigned the responsibility for redistricting to a Commission on Legislative Apportionment. As the Attorney General has correctly noted, legislative apportionment is a legislative function, and thus, the provisions establishing that Commission and governing its activity were appropriately included in the Legislative Article. The provisions addressing VNP's proposed Independent Citizens Redistricting Commission would likewise be included in the Legislative Article, in the same section as amended, and it is appropriate that the Commission would be housed within the legislative branch in light of the legislative nature of its functions.

[5] Copies of VNP's petition and the existing provisions of Const 1963, art 4, §§ 1-6 are attached as Appendices "C" and "D."

Like the Commission established by the existing provisions, the new Commission would perform the required redistricting independent of supervision or control by the Legislature and the Governor. Like the existing provisions, the new provisions would include a procedure for selection of the Commissioners designed to ensure a diversity of political viewpoints, and require the Legislature to appropriate the funding required to enable the Commission to carry out its functions. And like the existing provisions, the new provisions would provide for judicial review, the scope of which would remain unchanged with the single exception that this Court would no longer be empowered to order the adoption of a specific proposed redistricting plan. That purely ***legislative*** authority would be reserved for the Commission.

The Plaintiffs and the Attorney General have made much of the fact that the proposed amendment would transfer the authority for redistricting from the Legislature to the new Commission. Their discussion of this point overlooks a number of important points. First, as previously discussed, the people are free to define the structure of their government as they choose by amendment of the Constitution. Thus, objections that the authority for redistricting should be retained by the Legislature, in whole or in part, or that additional checks and balances should be included, are not objections that should be allowed to stand in the way of the people's right to approve or disapprove VNP's proposal. They are instead, objections that may be raised, along with any other objections to the substance of the proposal, to suggest that the voters should cast their votes against VNP's proposal on election day.

Second, the transfer of authority for redistricting to the new Commission would not involve the implementation of a new or revolutionary idea, as it would simply return that authority to the Commission established by the existing constitutional provisions with

improvements designed to secure its independence and ensure that the redistricting process could no longer be controlled or thwarted by the members of one political party. It should be recalled, in this regard, that the existing Commission has not been used in recent years because of this Court's decision in *In re Apportionment of State Legislature*, *supra,* which held that the constitutionally prescribed use of weighted land area/population formulae violated the Equal Protection Clause of the U.S. Constitution, and that the invalid provisions were not severable because it could not be safely assumed that the people would have voted to approve the Constitution without them. The Legislature could have elected to remedy the defect identified by this Court's decision by proposing an amendment of the legislative article for that purpose, but it did not choose to do so. It chose, instead, to arrogate to itself the authority to perform the redistricting function. There is certainly nothing novel or otherwise inappropriate about suggesting that this authority should again be exercised by an independent Commission, as the people intended when they voted to approve the our current Constitution.

Third, the suggestion that VNP's proposal would somehow effect a "fundamental" change dramatically altering the structure or functioning of our state government strains credulity in light of its limited purpose, the Commission's limited function of drawing state legislative and congressional election districts once every ten years, and the similarities between the proposal and the existing constitutional provisions.

As previously discussed, the proposed amendments to the Legislative Article would establish the new Citizens Commission as a permanent Commission in the legislative branch, replacing the existing constitutional provisions regarding apportionment of the state Senate and House of Representatives districts. The proposed additions to that Article would provide for the establishment and funding of the new Commission and define and facilitate the performance of

its duties, as the existing provisions did with respect to the originally established Commission. The new provisions would provide for selection of the Commission's politically-diverse members by use of a methodology designed to ensure that the redistricting process could no longer be controlled or thwarted by one political party; define the role of the Secretary of State in the selection of the Commission's members; prescribe the performance of the Commission's duties, including the criteria to be considered and applied in its development of the redistricting plans; and prescribe the procedures for the adoption and implementation of those plans.

If adopted by vote of the people, VNP's proposed Const 1963, art 4, § 6 would include provisions designed to ensure the independence of the new Commission. Those provisions would declare that the powers granted to the Commission would be considered legislative functions, exclusively reserved to the Commission and not subject to the control or approval of the Legislature. Thus, although VNP's proposal would shift the Legislature's ***legislatively conferred*** authority to perform the redistricting function to an independent Commission similar to the Commission prescribed by the existing language of Const 1963, art 4, § 6, and prohibit any legislative interference with the Commission's performance of that function, it would not suspend or erode any other part of the legislative power conferred under Article IV.

VNP's proposal would also allow limited review by the this Court. The new Subsection (19) addressing that issue is also quite similar to the existing provisions of Const 1963, art 4, § 6 and the subsequently enacted legislation. It would provide that this Court, in the exercise of its original jurisdiction, "shall direct the Secretary of State and the Commission to perform their respective duties"; that the Court "may review a challenge to any plan adopted by the Commission"; and that the Court "shall remand a plan to the Commission for further action" if the plan fails to comply with state or federal constitutional requirements or superseding federal

law. The significant difference is its proviso that, "[i]n no event shall any body, except the Independent Citizens Redistricting Commission acting pursuant to this section, promulgate and adopt a redistricting plan or plans for this state." Thus, this Court's role and authority with respect to the redistricting process would be the same as its current role and authority under the existing language of Const 1963, art 4, § 6, MCL 1996 PA 463 and 1999 PA 222, except that it would no longer be allowed the authority to order the adoption of its own preferred redistricting plan, as currently provided in Const 1963, art 4, § 6, and presently allowed by MCL 3.74 and MCL 4.264.

VNP's proposal would make minor changes in three sections of the Executive Article to ensure the continuity and independence of the Commission. The changes would add new language, similar to the language included in the proposed Const 1963, art 4, § 6, declaring that the powers granted to the Independent Citizens Redistricting Commission would be considered legislative functions, exclusively reserved to the Commission and not subject to the control or approval of the Governor. This change is intended, primarily, to assure that the Governor could not use his authority to reorganize government to interfere with the independence and authority of the new Commission, as occurred in *Straus* . The proposal would also amend Const 1963, art 5, § 4, addressing the establishment of temporary commissions or agencies, to recognize the proposed establishment of the Independent Citizens Redistricting Commission as a permanent Commission. No other modification or erosion of the executive power has been proposed.

The Attorney General has complained that VNP's proposal would infringe the Governor's authority to veto redistricting plans and appropriations of funding for the new Commission. This objection lacks merit for three reasons. First, the people are clearly

empowered to reduce the Governor's authority in this regard by amendment of the Constitution if they desire to do so. Second, the veto power is a legislative function. *Wood v State Administrative Board*, 255 Mich 220, 224-225; 238 NW 16 (1931); *Oakland County Commissioner v Oakland County Executive,* 98 Mich App 639, 651; 296 NW2d 621 (1980) Thus, when the Governor exercises his prerogative to veto legislation pursuant to Const 1963, art 4, § 33, he is exercising a part of the legislative power which has been delegated to the executive by that provision. Accordingly, a limitation of the Governor's veto power cannot be considered an infringement of his executive authority. Third, although the Governor would no longer be empowered to veto a redistricting plan because that authority extends only to legislation,[6] VNP's proposal does not purport to limit his authority to veto an appropriation.

VNP's proposal would amend the Judicial Article to impose a narrow limitation of this Court's authority to exercise superintending control; to issue, hear and determine prerogative and remedial writs; and to exercise appellate jurisdiction by the addition of new language specifying that the Court may exercise that authority except to the extent that its authority is limited or abrogated by Const 1963, art 4, § 6 or Const 1963, art 5, § 2. Thus, the Court would be empowered to adjudicate redistricting disputes as it has in the past, but would no longer be empowered to "promulgate and adopt a redistricting plan or plans for this state." No other limitation of the Supreme Court's jurisdiction or authority has been proposed.

Finally, although the new Commission would be empowered to exercise legislative authority, there is no basis for the Attorney General's claim that the new Commission would be

[6] It may be acknowledged that the people would not be permitted to challenge a redistricting plan by referendum since the ability to pursue that remedy is also limited to legislation in accordance with the controlling provisions of Const 1963, art 2, § 9, but the people's right to change the new system by further amendment of the Constitution would not be diminished.

authorized to exercise any executive or judicial power. VNP's proposal would add new language to the Executive Article and the Judicial Article to clarify that the authority conferred upon the Governor and the Court of Justice is vested in those branches except to the extent that their authority is limited or abrogated by the new provisions governing the new Commission's performance of the redistricting function. These provisions recognize the minor ***limitations*** of the authority granted to the Executive and Judicial Branches included in VNP's proposal, and as VNP has explained in its original brief in opposition to the Plaintiffs' Application for Leave to Appeal, those "Except to the extent limited or abrogated by" clauses were included out of an abundance of caution to avoid unfounded claims that VNP's petition had failed to republish existing constitutional provisions that would be abrogated by the proposed amendment if adopted by the voters. Those provisions do not confer any authority upon the new Commission to exercise any executive or judicial power.

RELIEF

WHEREFORE, the Intervening Defendants / Cross-Plaintiffs – Appellees respectfully request that Plaintiffs – Appellants' Application for Leave to Appeal be denied.

Respectfully submitted,

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